

# Book Note

## More Humble Servants:

### A Second Look at the Advisory Role of Judges

*Most Humble Servants: The Advisory Role of Early Judges.* By Stewart Jay.\*  
New Haven: Yale University Press, 1997. Pp. x, 288. \$35.00.

On August 8, 1793, five Justices of the United States Supreme Court refused to provide President Washington with the answer to one of the young republic's most important and politically charged questions (pp. 179-80).<sup>1</sup> With a stroke of their pen, these "most obedient and most h'ble Servants" (pp. 179-80)<sup>2</sup> at once removed both themselves and the entire future federal judiciary from the role of providing formal advice to the rest of the government.<sup>3</sup> In *Most Humble Servants: The Advisory Role of Early Judges*, Stewart Jay explores the historical origins of the Justices' refusal to issue advisory opinions. In contrast to other scholars,<sup>4</sup> Jay argues that the 1793 decision was directly influenced by the political climate and the ideological orientations of key political players at the time; it was not merely the logical evolution of constitutional structure or the simple acceptance of established judicial doctrine.<sup>5</sup>

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1. *Reprinting* Letter from John Jay et al., U.S. Supreme Court Justices, to George Washington, President of the United States (Aug. 8, 1793).

2. *Id.*

3. The early Justices did provide a few advisory-type opinions after the 1793 decision, *see* WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 178* (1995), but most commentators mark the 1793 letter as the recognized end of the Supreme Court's advisory role. As Jay notes: "[T]here is general agreement that the 1793 incident provides the source for not only the prohibition against advisory opinions but an entire constellation of doctrines falling under the label of 'justiciability' . . . . All have been explicitly associated by the Court with the rule against advisory opinions" (p. 172).

4. *See infra* notes 9-15 and accompanying text.

5. "In the main, both British and American attitudes toward advisory opinions are the product of historical circumstances and not the result of an overriding vision of the respective constitutions" (p. 7).

Jay explicitly declines to apply his historical analysis to the role of the judiciary in our modern world.<sup>6</sup> Nevertheless, his observations, about both the former advisory role of the judiciary and the circumstances of its rejection, offer reasons for reexamining the potential for a similar, if modified, role for the modern federal judiciary. In particular, Jay's historical exploration provides new support for Guido Calabresi's arguments in favor of a quasi-advisory role for judges in our constitutional system.<sup>7</sup>

## I

Jay's book presents a strong and convincing historical argument that the 1793 refusal to issue advisory opinions was the result of practical and political circumstances rather than abstract reasoning from constitutional theory.<sup>8</sup> Jay first meticulously establishes that the refusal to issue advisory opinions was neither necessary nor inevitable under contemporary Anglo-American judicial tradition and practice (pp. 48, 52, 54) and conceptions of the constitutional separation of powers (pp. 8, 76). In particular, Jay details the Supreme Court Justices' considerable pre-1793 extrajudicial activity (p. 92) and judicial advice (pp. 93, 95-99), including a number of instances in which the Justices wrote de facto advisory opinions (pp. 103-08). Jay then describes in detail the political crisis caused by the outbreak of hostilities between France and other European countries (pp. 113-34), and explains the resulting focus on the correct interpretation of the United States's treaties of friendship with France, the question that Washington ultimately put to the Supreme Court (pp. 134-37).

Providing a thorough historical account, Jay argues that two factors explain the Justices' refusal to answer Washington's question: the political crisis generated by the split between Jefferson and Hamilton (pp. 153-58), and the Justices' pragmatic desire to avoid political controversy (p. 175). Jay thus concludes that personal rivalry and practical, political interests, rather than the "abstract principles" that the Justices articulated in their letter, generated the refusal to provide an advisory opinion (p. 177).

Jay's historical argument is a novel and convincing one. American legal scholarship on advisory opinions previously has not undertaken such detailed historical analysis.<sup>9</sup> Instead, scholars have focused mainly on the doctrinal

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6. "The purpose of this book is not to explain, much less to question or even justify, the present vision of the judicial office. Rather, this book is a historical inquiry into the respective roles of early British and American judges as advisers to executive and legislative bodies" (p. 5).

7. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163-66 (1982); see also *Quill v. Vacco*, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 117 S. Ct. 2293 (1997).

8. Although he does not dispute the fact that some normative and structural considerations may have motivated the Justices, Jay argues that the doctrinal explanations are insufficient (p. 3).

9. See, e.g., ERNEST SUTHERLAND BATES, *THE STORY OF THE SUPREME COURT* 59 (1936) (reporting merely that Hamilton drafted Washington's questions and that "[t]he Court respectfully declined to consider them since they were outside of its province"); JAMES BRADLEY THAYER, *Advisory Opinions, in LEGAL ESSAYS* 42, 53-54 & 54 n.1 (1908) (noting only the sequence of events that occurred in Washington's 1793

analysis of international and state advisory opinions<sup>10</sup> and discussions of justiciability and related issues,<sup>11</sup> providing only brief discussions of the 1793 decision.<sup>12</sup> Most scholars simply accept the decision as a matter of predetermined constitutional structure<sup>13</sup> or reiterate without reflection the doctrinal statements given in the Justices' 1793 letter.<sup>14</sup> Although other scholars present the facts of the decision and reveal a greater advisory role for the early Justices, none presents a detailed explanation of the 1793 decision.<sup>15</sup> Jay's historical detail thus provides an important counterpoint to the historically light doctrinal explanations of other commentators.

At the end of his work, Jay concludes that in spite of its practical and pragmatic origins, the 1793 refusal to provide advisory opinions has become a paradigm case (p. 172) and thus precedential in its abstract implications (pp. 173-74, 176-77). While it is true that the abstraction has become doctrinally

request for advisory opinions and that advisory opinions were commonplace at the time of the denial), 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 107-11 (1928) (explaining only the sequence of events); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT REV. 123, 152 (contending that the decision was primarily influenced by the Justices' awareness that their actions would set constitutional precedent and by their concerns regarding the separation of powers).

10. See, e.g., James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251 (1990); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207 (1997); Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. REV. 1853 (1992).

11. See, e.g., Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 913-14 (1990) (discussing the general rule against advisory opinions as an introduction to the "case or controversy" requirement); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 647 (1992) (referring to the 1793 rejection in purely doctrinal terms and noting that "it is now clear that the federal judiciary is constitutionally prohibited from dispensing the kind of advice that President Washington requested").

12. See, e.g., Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203, 220-23 (1949) (presenting merits of advisory opinions); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003-05 (1924) (arguing against advisory opinions); Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 975-76 (1924) (briefly discussing the 1793 decision); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302, 1317 (1956) (discussing judicial doctrine on advisory opinions).

13. See, e.g., STANLEY M. ELKINS & ERIC L. MCKITTRICK, *THE AGE OF FEDERALISM* 352 (1993); 1 JULIUS GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801*, at 626 n.68 (1971); FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 280 (1979); 1 WARREN, *supra* note 9, at 111.

14. See, e.g., BATES, *supra* note 9, at 59; Wheeler, *supra* note 9, at 152. Charles Warren provides the clearest example of this kind of doctrinal reasoning. Although Warren recognizes that "the impression was prevalent at that period that the President had the right to seek the opinion of the Judges on questions of law," 1 WARREN, *supra* note 9, at 109, he still refers to Washington's request as a "radical step," *id.* at 108. Rather than exploring the events behind the refusal, he simply reports the contents of the Justices' letter and summarily characterizes the refusal as a "firm stand" by which the Court "established itself as a purely judicial body." *Id.* at 110-11. He provides no explanation for the refusal, instead simply articulating its doctrinal effect. Other authors present similar treatments (p. 2).

15. Casto, for example, reports that the extrajudicial role of early judges was related to the natural law jurisprudence popular at the time, see CASTO, *supra* note 3, at 183, and that advisory opinions were offered before and after the 1793 decision, see *id.* at 178-80. He does not explain, however, why the Justices decided to refuse Washington's request, apart from suggesting that "[t]hey were not guided by inflexible rules; their actions are better described as the pragmatic application of general principles to specific situations." *Id.* at 173.

rooted and otherwise justified in American constitutional law,<sup>16</sup> however, Jay's historical exploration suggests that the principle's significance may bear reexamination. More specifically, Jay's work suggests that a quasi-advisory role along the lines suggested by Guido Calabresi should be reconsidered.

## II

Calabresi, in *A Common Law for the Age of Statutes*,<sup>17</sup> argues that because of the increasing "'statutorification' of American law,"<sup>18</sup> America "face[s] a serious problem of legal obsolescence."<sup>19</sup> To address this problem, Calabresi argues that judges should consider applying a modified technique of common-law-like updating of obsolete statutes and common law precedents.<sup>20</sup> Courts would decide "when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it."<sup>21</sup> They would then apply a kind of second-look doctrine by sending questionable legislation in a case back to the legislature to determine if it was still up to date: "Often . . . the appropriate technique will be to enter into a dialogue, to ask, cajole, or force another body (usually the legislature but sometimes the agencies) to define the new rule or reaffirm the old."<sup>22</sup>

In some cases, instead of immediately striking down or revising obsolete or constitutionally questionable statutes, courts could merely threaten to do so, pressing administrative agencies or legislatures into action by advising them that the courts might act if these bodies do not.<sup>23</sup> Judges would engage in the dialogue by carefully crafting their opinions,<sup>24</sup> creating in some cases what Calabresi terms "constitutional remand[s]"<sup>25</sup> that suggest, but do not

16. See *Clinton v. Jones*, 117 S. Ct. 1636, 1647 & n.33 (1997) (noting the long-standing prohibition on Article III courts' providing advisory opinions and citing history through two centuries of case law).

17. CALABRESI, *supra* note 7.

18. *Id.* at 1.

19. *Id.* at 162.

20. See *id.* at 163-66.

21. *Id.* at 164.

22. *Id.*

23. As Calabresi explains:

[T]he courts can do any of several things when they have decided that an old rule is out of phase. They can strike down the existing rule and [1] substitute a new one. . . . [2] declare a new rule not of their making to be applicable. . . . [3] begin the process of creating a new rule . . . . [4] revise part of the old rule and leave the rest in a state of uncertainty . . . . and [5] leave no rule in effect. . . . Perhaps more important, they can *do* none of these things, but *threaten* to do any or all of them, if a legislature or administrative agency does not act quickly. They can shape that legislative or administrative action by announcing, or by failing to announce, what they will do in the absence of such action.

*Id.* at 148; see also *id.* at 149-51 (discussing Florida and Hawaii supreme court cases in which the courts "refused to act, but suggested that [they] might act unless the legislature reconsidered the old rule within a set time" as examples of this quasi-advisory technique).

24. See *id.* at 164.

25. *Quill v. Vacco*, 80 F.3d 716, 738 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 117 S. Ct. 2293

immediately constitute, judicial action. Although this updating technique is not a simple advisory opinion in the classic sense, it does involve a statement by the judiciary to the other branches of government advising them that a law is close to being unconstitutional or that it is out of date. Constitutional remand, therefore, is a kind of extrajudicial or advisory function similar to that exercised by early judges.

Although Calabresi's nineteenth-century common-law-type solution to a twentieth-century statutory problem may seem unrelated to the history of an eighteenth-century decision, Jay's conclusion that early judges played an effective and legitimate advisory role suggests that modern judges might play a similar quasi-advisory Calabresian one. First, Jay's research suggests that judges in the Anglo-American tradition have historically been capable of playing an advisory updating function similar to that advocated by Calabresi. Eighteenth-century English judges (p. 13), American state judges (p. 56), and even Supreme Court Justices (pp. 96-97) all gave advisory opinions on legislative repeal and reform. Some of Calabresi's critics have argued that judges' performing an updating function is questionable today as a matter of institutional competence<sup>26</sup> and that judges may have lost some of their advisory expertise over the past two centuries. The fact that they once successfully played this role, however, suggests that playing a similar one would be neither impossible nor undesirable from a practical point of view.<sup>27</sup>

Additionally, Jay's research adds support to arguments in favor of the historical legitimacy of such a specific (if limited) role for the judiciary. Calabresi's critics have specifically questioned the constitutional and general legitimacy of the constitutional remand.<sup>28</sup> Some critics have argued against it on historical grounds, suggesting comparisons to the quasi-advisory judicial "Council of Revision" proposal rejected in the Constitutional Convention.<sup>29</sup>

(1997). In *Quill*, Judge Calabresi stated that he would not rule on the constitutionality of the New York statute forbidding assisting suicide, choosing instead to use a "constitutional remand." *Id.* at 738-43. Declining for the time being to reach the constitutional question, Judge Calabresi presented his opinion that the statute in question was out of date and came close to implicating constitutional issues. *See id.* at 742-43.

26. *See, e.g.*, Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1169 (1982) (reviewing CALABRESI, *supra* note 7) ("There is still little basis for confidence that courts are especially competent surveyors of a legal topography. . . . The courts do not and really cannot function as an ongoing American Law Institute."); Steven MacIsaac, *Common Sense About the Age of Statutes*, 81 MICH. L. REV. 754, 765-68 (1983) (reviewing CALABRESI, *supra* note 7) (questioning judges' abilities to assess majoritarian sentiment).

27. *But cf.* Estreicher, *supra* note 26, at 1169-71 (suggesting that the quasi-updating role of administrative agencies makes a similar updating role for judges problematic).

28. *See, e.g.*, Frank M. Coffin, *The Problem of Obsolete Statutes: A New Role for Courts?*, 91 YALE L.J. 827, 833-36 (1982) (reviewing CALABRESI, *supra* note 7) (questioning the constitutionality and "fit" with the legal system of the updating function); Archibald Cox, 70 CAL. L. REV. 1463, 1469-70 (1982) (reviewing CALABRESI, *supra* note 7) (discussing the majoritarian legitimacy of common law powers); Estreicher, *supra* note 26, at 1158-65 (questioning the legitimacy of the updating function).

29. For example, Frank Coffin, then chief judge of the First Circuit, criticized the quasi-advisory role as harkening back to the proposed "Council of Revision," whose rejection by the Framers he interpreted as a rejection of judges' legislative advisory capabilities. *See* Coffin, *supra* note 28, at 835-36. Steven MacIsaac similarly questioned the remand's legitimacy and viability by asking whether the courts would

Jay's historical discussion thus suggests two responses to Calabresi's critics. First, the fact that political realities and not foundational considerations produced the refusal to provide advisory opinions suggests that some of the extrajudicial functions that Judge Calabresi advocates may not implicate structural constitutional concerns.<sup>30</sup> Second, and more specifically, the fact that an advisory role for judges was considered legitimate until 1793 mitigates legitimacy concerns tied to the intent of the Framers. Indeed, the Framers and their contemporaries considered an advisory role for the judiciary structurally legitimate. A quasi-advisory role might therefore be similarly legitimate today.<sup>31</sup>

In sum, Jay develops a sound historical argument that political and pragmatic, rather than structurally or doctrinally deterministic, considerations underlie the refusal to provide advisory opinions. Jay's exploration of the past also suggests new perspectives on the present. His analysis uncovers facts that demonstrate the practical ability of judges to perform activities similar to the quasi-advisory updating role proposed by Calabresi, and suggest that the legitimacy of such a role has a limited historical precedent. Overall, Jay's look at the advisory role of early judges suggests that we should take a second look at a quasi-advisory role for our modern most humble servants.

—Jay L. Koh

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be able to respond to majoritarian concerns or would merely become "reversible Councils of Revision." MacIsaac, *supra* note 26, at 765.

30. The possibility of limited extrajudicial action by a judicial agency or judges was approved with reference to early extrajudicial activities by judges in *Mistretta v. United States*, 488 U.S. 361, 398-408 (1989), which upheld the service of Article III judges on the United States Sentencing Commission and highlighted the past extrajudicial activities of federal judges, including those of Chief Justice John Jay.

31. Of course, differences abound both between Calabresi's proposed quasi-advisory role and the historical advisory role, and between the world before 1793 and the world of 1997. First, complexities in modern statutory and administrative law may make practical comparisons to mechanisms last used in 18th-century America entirely irrelevant. Second, differences between Calabresi's constitutional remand and the historical advisory opinion may undermine arguments from historical legitimacy. For example, the constitutional remand can sometimes lead to the actual striking down of out-of-date laws, *see* CALABRESI, *supra* note 7, at 2, while advisory opinions have traditionally had no direct binding effect, *see* THAYER, *supra* note 9, at 46-56. Additionally, advisory opinions are requested; Calabresi's quasi-advisory actions may be taken *sua sponte*, which has implications for the balance of legislative and judicial powers. *Cf.* MacIsaac, *supra* note 26, at 768 ("This is dialogue with a vengeance."). Finally, the growth in the separation-of-powers doctrine and the evolution of the federal government may also render arguments about legitimacy drawn from the history of early judges less relevant. Jay himself states that the 1793 decision has become a paradigm case for the proposition that Article III courts will not engage in the issuance of advisory opinions (p. 172), and the modern Supreme Court has repeatedly expressed its strong doctrinal opposition to providing advisory opinions, *see, e.g.*, *Clinton v. Jones*, 117 S. Ct. 1636, 1647 & n.33 (1997). Thus, although an advisory role might have been viable in the early republic, modern considerations may have made even a quasi-advisory role for judges undesirable, illegitimate, or otherwise unworkable today.